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Supreme Court, U.S.
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No. 97-339

In The

Supreme Court of the United States

October Term, 1997

MICHIGAN MUTUAL INSURANCE COMPANY,
a Michigan corporation,
as subrogee of Center Manufacturing, Inc.,

Petitioner,

v.

OSRAM SYLVANIA, INC., a New York corporation,
formerly known as GTE PRODUCTS CORPORATION,
a New York Corporation,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

THE PETITION SHOULD BE GRANTED, AS THE DISTRICT COURT AND COURT OF APPEALS BLATANTLY VIOLATED THIS COURT'S WELL-ESTABLISHED RULES GOVERNING THE RESOLUTION OF SUMMARY JUDGMENT MOTIONS

A. Michigan's Economic Loss Doctrine 2

B. The District Court Granted, And The Court Of Appeals Affirmed, Summary Judgment For Respondent By Improperly Drawing Inferences From The Facts In Favor Of Respondent, The Moving Party 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Adickes v S.H. Kress & Co., 398 U.S. 144, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970) 5

Anderson v Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d (1986) 5, 7

Detroit Edison Company v NABCO, Inc., 35 F.3d 236 (6th Cir. 1994) 4

Eastman Kodak Co. v Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992) 5

Huron Tool and Engineering Company v Precision Consulting Services, Inc., 209 Mich. App. 365, 532 N.W.2d 541 (1995) 4

Matsushita Electric Industrial Co., Ltd. v Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986) 5

Neibarger v Universal Cooperatives, Inc., 439 Mich. 512, 486 N.W.2d 612 (1992) 4, 9

Saratoga Fishing Company v J.M. Martinac & Company, ___ U.S. ___, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997) 3

U.S. v Diebold, Inc., 369 U.S. 654, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962) 5

OTHER COURT RULES

Fed. R. Civ. P. 56 ..... 1, 6

INTRODUCTION

In its Petition for Writ of Certiorari, Petitioner, Michigan Mutual Insurance Company ("Petitioner"), established how the District Court committed a fundamental error in granting Respondent, Osram Sylvania, Inc. ("Respondent"), summary judgment. The District Court drew inferences from the facts in favor of Respondent, **the moving party**, even though 1) genuine issues of material fact remained which should have precluded summary judgment, and 2) **at the very least** there were equally reasonable (if not more so) inferences from the facts that could be drawn in Petitioner's favor, once again requiring that Respondent's motion be denied. The Court of Appeals then exacerbated this error by affirming the trial court (although at least one of the three Court of Appeals Judges recognized the critical mistake being made, and properly dissented).

Such action flies in the face of this Court's established precedent regarding the disposition of summary judgment motions. It also sends a dangerous message to federal trial and appellate courts around the country, encouraging them to sit both as judge and jury, thereby converting the Fed. R. Civ. P. 56 summary judgment mechanism into a substitute for a trial. In short, the obvious error that occurred here is of such magnitude that it justifies this Court's intervention.

In its response, Respondent attempts to complicate matters as much as possible, obviously hoping that by doing so this Court will simply throw its hands up in the air and choose not to get involved. In the process, it makes inconsistent and inaccurate arguments regarding

the law, along with numerous misrepresentations regarding Petitioner's arguments and the evidence presented to the trial court. So that this Court can see this case for what it is, and not for what Respondent would like it to be, Petitioner submits this Reply Brief.

ARGUMENT

THE PETITION SHOULD BE GRANTED, AS THE DISTRICT COURT AND COURT OF APPEALS BLATANTLY VIOLATED THIS COURT'S WELL-ESTABLISHED RULES GOVERNING THE RESOLUTION OF SUMMARY JUDGMENT MOTIONS

A. Michigan's Economic Loss Doctrine

In its Petition, Petitioner discussed Michigan's economic loss doctrine, and the "other property damage" exception to that doctrine. Analyzing the exception in light of the facts of this case, Petitioner's tort claims for damage to Center Manufacturing, Inc.'s ("Center") other property are barred by the economic loss doctrine **only** if two things are established. First, a fire causing extensive damage was within the contemplation of Center when the lamp in question was purchased. Second, when the lamp was purchased Center had an opportunity to negotiate with Respondent, allocating the risk of such a fire. (*See* Petition, pp. 12-15).[1]

[1] Because this case arises under Michigan law, this Court's prior decisions regarding the economic loss doctrine in other settings are not probative. However, it is interesting to note that pursuant to this Court's view of the doctrine in an admiralty law context, **all** other property damage claims are *per se* immune

While this two-part test is not the subject of Petitioner's Petition[2], Respondent spends a good deal of its Brief in Opposition questioning the validity of this test. However, this is done in a strangely inconsistent manner. First, in discussing what the District Court did, Respondent refers to this two-step test as if there is no question regarding its validity. (Brief in Opposition, pp. 4-5). Next, it begins to back off from the second step of the test, questioning whether the opportunity to negotiate had to exist at the time the product was purchased (suggesting, without any supporting authority, that a post-sale opportunity to negotiate is sufficient). (Brief in Opposition, p. 5, n. 3). Finally, Respondent totally rejects the second step of the test, asserting "the absence of an opportunity to negotiate the allocation of the risk does not bar the application of the economic loss doctrine." (Brief in Opposition, p. 12).

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from the economic loss doctrine. *See Saratoga Fishing Company v J.M. Martinac & Company*, ___ U.S. ___, 117 S.Ct. 1783, 138 L.Ed.2d 76 (1997). If that rule applied here, Petitioner's case could not have been dismissed.

[2] As discussed in the Petition (*see* page 10, n. 3), Petitioner is not contending the District Court and/or the Court of Appeals misinterpreted Michigan's economic loss doctrine, or the two-step other property damage exception test. Petitioner challenges their determination that based on the facts and evidence presented in connection with Respondent's Motion for Summary Judgment, Respondent satisfied each step of the test as a matter of law.

This does not implicate purely Michigan state law concerns regarding the contours of the economic loss doctrine. Rather, it implicates this Court's rules for how summary judgment motions are to be resolved, and how the evidence presented in connection with such motions is to be viewed, by federal courts.

In any event, Respondent's attacks on the aforementioned two-step other property damage exception test fail when Michigan case law (the source of the court-created economic loss doctrine) is consulted. This test was first articulated by the Michigan Supreme Court in *Neibarger v Universal Cooperatives, Inc.*, 439 Mich. 512, 486 N.W.2d 612, 620 (1992), as recognized in *Detroit Edison v NABCO, Inc.*, 35 F.3d 236 (6th Cir. 1994):

> The rule that emerges from *Neibarger* significantly narrows the "other property" exception while expanding the definition of economic loss. Under *Neibarger*, **tort claims for damage to other property are barred by the economic loss doctrine if those losses are direct and consequential losses that were within the contemplation of the parties and that, therefore, could have been the subject of negotiations between the parties.**

35 F.3d at 242 (emphasis added). Any doubt about the importance of the second element of this test – an opportunity to negotiate – disappeared in 1995 with the Michigan Court of Appeals' decision in *Huron Tool and Engineering Company v Precision Consulting Services, Inc.*, 209 Mich. App. 365, 532 N.W.2d 541 (1995):

> . . . **[T]he economic loss doctrine does not apply where there is no contractual relationship between the parties – that is, where the parties have never been in a position to negotiate** the economic risks themselves. –

532 N.W.2d at 545 (emphasis added). Consequently, given the deep roots the two-step test has in Michigan law, Respondent's baseless attacks against it should be rejected out of hand.

B. The District Court Granted, And The Court Of Appeals Affirmed, Summary Judgment For Respondent By Improperly Drawing Inferences From The Facts In Favor Of Respondent, The Moving Party

Petitioner has established that, **at the very least**, conflicting inferences arose from the undisputed facts regarding Center's contemplation of the risk and opportunity to negotiate when it purchased Respondent's lamps. (*See* Petition, pp. 18-22). This Court **requires** inferences from the facts be drawn in favor of the non-moving party. *Eastman Kodak Co. v Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992); *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L.Ed.2d (1986); *Matsushita Electric Industrial Co., Ltd. v Zenith Radio Corp.*, 475 U.S. 574, 587-588, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Adickes v S.H. Kress & Co.*, 398 U.S. 144, 158-159, 90 S. Ct. 1598, 26 L.Ed.2d 142 (1970); *U.S. v Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L.Ed.2d 176 (1962). By blatantly ignoring this Court's rules, and drawing inferences from the facts in favor of Respondent, **the moving party**, the District Court and Court of Appeals have committed the most fundamental of errors.

In its Brief in Opposition, Respondent makes several arguments in an attempt to convince this Court that there were no reasonable inferences from the facts that could be drawn in Petitioner's favor. Consequently, Respondent contends the District Court and Court of Appeals acted properly in drawing inferences in its favor. However, on closer examination none of Respondent's arguments have any merit.

First, Respondent argues there is no factual basis for Petitioner's claim that Center acted as a consumer when it purchased the lamps in question, and, as such, the economic loss doctrine should not apply to its tort claims. (Brief in Opposition, pp. 8, 13-14). Respondent is addressing the wrong argument. While this "consumer" argument was one of several arguments Petitioner made to the District Court and Court of Appeals, it **is not** an argument Petitioner makes to this Court.[3] Therefore, Respondent's argument is irrelevant.

Second, Respondent claims there is no evidentiary basis for the inference that Center had no reason to suspect, at the time of purchase, that Respondent's lamp might cause a fire. (Brief in Opposition, p. 17). It is astounding Respondent makes this argument, as it knows it is not true. In its Petition, Petitioner discusses at length a "Burning Positions" diagram that accompanied Respondent's lamps at the time they were purchased. (*See* Petition, pp. 4-5, 15-16, 19-20, and App. 39). **It specifically stated Respondent's lamp could be safely operated in a vertical position in an uncovered fixture!** Given such an assurance by Respondent, it is quite reasonable to infer that, at the time of purchase, Center could not foresee Respondent's lamp would explode and cause extensive damage to Center's property when operated in a vertical

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[3] This consumer argument goes to the scope of the economic loss doctrine, which is a question of Michigan state law. In its Petition, Petitioner addresses only questions of federal court procedure, *e.g.*, standards for granting summary judgment pursuant to Fed. R. Civ. P. 56.

position in an uncovered fixture (**the way Center used the lamp**).

It is interesting to note that nowhere in its Brief in Opposition does Respondent discuss, or even mention, this diagram. Nor does Respondent refute Petitioner's argument regarding the reasonable inference that arises from the diagram. Respondent obviously wishes the diagram did not exist.[4] However, it does exist, and from it a very plausible inference arises – a fire causing extensive damage was **not** within the contemplation of Center when the lamp was purchased. This inference, if accepted, would preclude summary judgment as the first step of the other property damage exception test would not be satisfied. Even if there was an equally plausible

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[4] Respondent also argues the District Court and Court of Appeals "properly rejected" Dr. Burton Davidson's (Petitioner's warnings expert) evaluation of Respondent's pre-1985 warnings (concluding they were grossly inadequate) in favor of "a common sense conclusion." (Brief in Opposition, p. 11). Rather than supporting Respondent's position, this argument actually makes Petitioner's point!

In the context of a motion for summary judgment, a court cannot simply reject an expert's findings without some basis. Respondent **never** provided any reason, other than its own unsubstantiated assertions there was no foundation for Dr. Davidson's opinions (easily refuted by the text of Dr. Davidson's Affidavit, *see* App. 35), why his opinions should not be considered. Consequently, what the District Court and Court of Appeals effectively did was to decide Dr. Davidson's opinions were not entitled to any weight. With all due respect to those courts, **they do not have that power**. *See Anderson*, 477 U.S. at 255. This is yet another example of how the lower courts in this case improperly placed themselves in the role of the jury.

competing inference in Respondent's favor, the District Court and Court of Appeals were not permitted to make a choice. For the purposes of Respondent's motion, these courts **had** to select the inference favorable to Petitioner. By doing otherwise, these courts reversibly erred.

Finally, while **admitting** Center had no opportunity to negotiate with it at the time the lamps were purchased, Respondent argues there might have been an opportunity to negotiate several years **after** the lamps were purchased. (Brief in Opposition, p. 5, n. 3). This argument fails for a number of reasons. First and foremost, **it is a new argument never before made by Respondent**. Respondent never argued to the District Court or Court of Appeals that there might have been a post-sale opportunity to negotiate, and neither of those courts found any such opportunity existed. Consequently, it is not an argument that should be considered by this Court.[5]

Moreover, even if this argument is considered, there is no legal basis for concluding that a post-sale opportunity to negotiate will satisfy the second part of the other property damage exception test. **No** Michigan state or federal case has ever held that it does, and Respondent cites **no** authority in support of its argument.

Indeed, it would make little sense to look at opportunities to negotiate after the defective product in question has been purchased, and the Uniform Commercial

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[5] Consideration of this argument for the first time on appeal, without Petitioner having previously had an opportunity to introduce evidence to the contrary when Respondent's Motion for Summary Judgment was briefed, would be unjust and unfair.

Code's statute of limitations has commenced to run. The economic loss doctrine is premised on the assumption that **when a product is purchased**, commercial parties can negotiate warranties, insurance requirements, etc. in order to allocate the risk of product malfunction.[6] If an opportunity to negotiate arises sometime after the sale, this critical window of opportunity is lost. The product is already in place, and any warranties, etc. to be had have already been issued.

Consequently, the **undisputed** fact remains that at the time Center purchased Respondent's lamp, it had no opportunity to negotiate with Respondent regarding the risk of the lamp causing a fire or other calamity. There really is only one plausible inference that arises from this – the opportunity to negotiate "the economic loss doctrine requires as its premise simply did not and could not exist." (App. 9 - Dissent from Court of Appeals Opinion).

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[6] For example, the Michigan Supreme Court observed in *Neibarger*:

> . . . [I]n a commercial transaction, the parties to a sale of goods have the opportunity to negotiate the terms and specifications, including warranties, disclaimers, and limitation of remedies. When a product proves to be faulty **after the parties have contracted for sale** and the only losses are economic, the policy considerations supporting products liability in tort fail to serve the purpose of encouraging the design and production of safer products . . . [T]he adoption of the economic loss doctrine will allow sellers to predict with greater certainty their potential liability for product failure and to incorporate those predictions **into the price or terms of the sale.**

486 N.W.2d at 616, 619 (emphasis added).

Even if a contrary inference could somehow be justified, the existence of a plausible inference favorable to Petitioner, the non-moving party, is enough to defeat Respondent's Motion for Summary Judgment (as the second part of the other property damage exception test has not been satisfied). The Court of Appeals reached the opposite conclusion, and its decision should be reversed.

CONCLUSION

For the foregoing reasons, along with those discussed in its Petition, Petitioner Michigan Mutual Insurance Company respectfully requests that its Petition for Writ of Certiorari be granted, and upon further briefing and oral argument, the April 17, 1997 Opinion of the United States Court of Appeals for the Sixth Circuit be reversed, and this case be reinstated and remanded for further proceedings.

Respectfully submitted,

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